DECISION AND RECOMMENDATIONS OF THE ARBITRATOR

IN THE MATTER OF ARBITRATION	)	
	)	
BETWEEN	)	Class Action Grievance
	)	
Adams-Arapahoe 28J School District (the District)	)	Aurora, Colorado
	)	
AND	)	
	)	
Aurora Education Association (the Association)	)	

BEFORE: Jon Numair, Arbitrator

APPEARANCES:

For the Employer: Michael W. Schreiner, Attorney
Caplan and Earnest, LLC

For the Association: Charles F. Kaiser, Legal Counsel
Colorado Education Association

Place of Hearing: Aurora, CO

Date of Hearing: November 5, 2018

Briefs Received: November 16, 2018

Date of Award: January 7, 2019

Witnesses called by the Employer

Damon Smith

Witnesses called by the Union

Frank O'Hara
Pam Shamburg
Amy Nichols
Sara Fitouri
Bruce Wilcox.

ISSUE

The District proposed the following statement of the issue:

> *Did the School District violate the Master Agreement when it did not bargain the one-year pilot program providing one-time stipends to recruit and retain teaching staff in some of the District hardest to fill positions?*

The Association did not put forth a formal statement of the issue, but voiced a similar view. Having heard the opening statements, the presentations, and after reading the post-hearing briefs, the Arbitrator frames the issue(s) as follows:

1. Is the grievance properly before the Arbitrator? If so…
2. Did the District violate the Agreement when they implemented a pilot program of *"incentives to recruit and retain staff in some of the hardest to fill positions"* without bargaining the program with the Association. If so, what is the proper remedy?

BACKGROUND

As noted at the hearing and in the briefs, there is little to no dispute of the facts giving rise to the case. The Adams-Arapahoe School District No. 28J, or Aurora Public Schools (the District) has sought a way of incentivizing teachers to work in what they term *"hard to staff"* positions for, at least, a couple of years. In 2015, the District formed a task force to study the issue. The task force made recommendations which were presented during bargaining for a successor agreement in the 2016 negotiations between the parties, but no agreement was reached. In December, 2017, District Superintendent Rico Munn informed leadership of the Aurora Education Association (the Association) that the District was intending to implement a stipend system for the retention of teachers in these positions. It was apparently a courtesy notice with no details provided.

During a School Board Meeting on January 9, 2018, the Superintendent proposed a modification of the 2017-18 budget to the Board of Education, which would provide $1.8 million for a pilot program targeting hard to staff positions. According to the Minutes of that meeting, Superintendent Munn stated

> *"…it is not a sustainable amount. It is to develop a pilot to see if there is success in addressing hard to fill positions. If there is success the district will return to the board to see if there are funds to move forward or not."*

On January 23, 2018, the Board of Education approved the requested funds for the program. There was little discussion and no further detail was provided.

On February 7, District Chief Personnel Officer Damon Smith disseminated a Memorandum, by way of an email, to Principals and certain District Directors titled "*Recruitment and Retention Pilot for Targeted Roles for the 2018-19 school year.*" In the Memo, Mr. Smith provided program details, including a statement as to revenue source (*a one-time increase in revenue for the 2017-18 school year due to property taxes)*, an explanation of the program (*...a one-year pilot to enhance recruitment and retention of our hardest to fill positions by offering incentives. Given that most of our neighboring districts offer incentives, this pilot allows us to remain competitive).* It also included a chart naming categories of educators that would be eligible and specific monetary incentives to be offered. It concluded with a list of Next Steps – which would include the naming of eligible schools, the promise of future communications, and a web link the recipients could use to pose any questions they had.

On February 15, 2018, Mr. Smith sent a second Memo to the same list of addressees, almost identical to the first, but the specific schools being targeted by the pilot were named for the first time. Mr. Smith sent another email on February 22, 2018 to a long list of recipients, presumably administrators, providing additional mechanics of the program.

On March 15, 2018, the Association filed a grievance alleging unilateral implementation of the stipend. The grievance was processed in an orderly fashion and held in abeyance for a period of time. The District issued a Level 2 denial on June 22, 2018, and the Association requested arbitration on July 5, 2018.

The District paid the disputed stipends to employees eligible under their guidelines on August 31, 2018.

The District raised two procedural objections at the hearing 1) The Association waived its right to bargain over the program by failing to request bargaining over the issue, and 2) The Grievance was not timely filed.

Each party had full opportunity to present witnesses and evidence in support of their positions. The parties chose to summarize their cases in the form of written briefs to be submitted no later than November 16, 2018. The briefs were received in a timely manner after which the record was closed. In accordance with Article 44, Section 6.d. of the Collective Bargaining Agreement (the Agreement)[1], the Arbitrator's decision shall be advisory.

[1] Agreement between the Aurora Public Schools Board of Education and Aurora Education Association (June 1, 2015 – June 30, 2020

RELEVANT NEGOTIATED PROVISIONS [2]

Article 2, Section 1
The Board recognizes the Association as the exclusive representative of all licensed professional staff, including full-time and regular part-time career and technical teachers hired on contract, employed now or during the life of this Agreement (excluding administrators, substitute teachers, summer school teachers, limited part-time teachers, and hourly postsecondary and/or adult career and technical teachers), in matters involving collective negotiations with respect to wages, hours and other conditions of employment affecting any personnel in the unit.

. . . .

Article 3, Section 1
The obligation to negotiate shall arise only when a timely request is made in accordance with the Article entitled Term of Agreement, and the matters subject to negotiation shall be only those permitted by the Article entitled Recognition; provided, however, this shall not precluded the parties, by mutual written agreement, from negotiating at other times or on other topics nor shall it preclude amendment, modification or supplementation of this Agreement during its term, by mutual written agreement. (2014)

. . . .

Article 3, Section 3
The minimum salaries of employees covered by this Agreement shall be those established in negotiations between the parties. In any given year, the parts of this agreement dealing with compensation shall be subject to negotiations, which include Appendices A, B and C, Article 11, Section 16.b. (Medical Insurance). Additionally, either party may bring up to two (2) issues for negotiation unless the parties mutually agree to negotiate other matters. Such issues shall be provided by each team by November 1, of the school year in which such issues are to be negotiated. Each team agrees that it shall provide the issue and the corresponding articles within which each team desires to address its respective issues. Each team shall specify the articles which it believes address the issue, but may specify not more than a total of nine (9) articles in which each team, according to its respective issues, desires to see the two (2) issues addressed.

For years in which either party wishes to bargain more than two (2) issues, the party bringing such additional issues must provide those additional issues, in writing, to the other party, by July 1 of the school year in which that party desires to bargain such issues.

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[2] Ibid

The parties agree that each article shall be subject to bargaining in a period not greater than every six (6) years. In the event that an article is not addressed within a six (6) year period, that article becomes a mandatory article of negotiations in its seventh year. Any such negotiations shall be conducted as set forth in Article 3 of this Agreement. (2014)

. . . .

Agreement Article 3, Section 16
The Board agrees not to negotiate with any teacher organization other than the Association while this Agreement is in effect. The Board also agrees not to negotiate matters covered by this Agreement directly with one (1) or more employees; provided, however, the Board specifically reserves the right to communicate with its employees and to advise them of Board policies on such matters as the Board or the Superintendent shall deem appropriate. (2014)

. . . .

Agreement Article 44 - Grievance Procedure

5. The following shall govern the processing of all grievances:

a. No grievance shall be valid unless it is submitted at Step 1 of the grievance procedure within 30 calendar days after the grievant knew, or should have known, of the circumstances on which the grievance is based, except that any alleged violative practice that is continued beyond the 30- day period shall continue to be subject to the grievance procedure. (2014)

b. It is agreed that if a grievant and/or the Association fails to meet the deadline for submission of the grievance to the next step, the grievance shall be considered settle adversely to grievant. If the question of arbitrability is contested at any level of the grievance procedure, the questions and the grievance shall be submitted immediately to Step 3 of this procedure. (2014)

. . . .

Agreement Article 48, Section 1
The parties acknowledge that during the negotiations that resulted in this Agreement, each had the unlimited right and opportunity to make demands and proposals with respect to any subject or matter not removed by law from the area of negotiations, and that the understandings and agreements arrived at by the parties after the exercise of that right and opportunity are set forth in this Agreement (and in the Appendices attached hereto) between the parties. Therefore, the Board and the Association, for the life of this Agreement, each voluntarily and without qualification, waives the right, and each agrees that the other shall not be obligated, to

bargain collectively with respect to any subject or matter not specifically referred to or covered by this Agreement even though such subject or matter may not have been within the knowledge or contemplation of either or both of the parties at the time they negotiated this Agreement. (2014)

CONTENTIONS OF THE PARTIES

Position of the Association

Merits of the case

The Association contends the District violated the Agreement by implementing a condition of employment without bargaining that condition with the Association, the exclusive bargaining representative of the District's teachers. They argue, regardless of how the stipend is characterized, it is a mandatory subject of bargaining. They point to three arbitration decisions, addressing similar issues, all of which were decided in the Associations' favor, along with interpretations of the National Labor Relations Act (NLRA or the Act) and Colorado Supreme Court decisions regarding public sector disputes that give deference to the Act, as substantiation for their argument. *Jefferson County School District v. Shorey,* 826 P.2d 830, 837 (Colo. 1992).

Under the NLRA, they argue,

> *...courts consider whether the payment is tied to the nature and scope of the employees' job responsibilities, and whether the payment is taxed as wages* (Radio Technical School, Inc. v. NLRB, 488 F2d 457, 460 (3rd Cir. 1973) [3]

The stipend at hand meets this definition as it is tied to the scope of employees' job responsibilities, it was taxed as wages, and it was conditionally paid. They point out the mandatory negotiation language of the Agreement mirrors the controlling language of the NLRA. As such, interpretations of the NLRA have great value in this analysis.

They argue the one-year nature of the stipend is/was uncertain by the initiator of the payment (Superintendent Munn). Mr. Munn was hopeful of a successful pilot and continued funding which would allow the program to continue. Thus, the classification of the program as a "*pilot*" has no bearing on the District's obligation to bargain it.

Finally, they argue the parties have included many other stipends in the Agreement, demonstrating their intent to include them in the Collective Bargaining process.

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[3] Post-Hearing Brief of the Association

Timeliness

On the timeliness defense raised by the District, the Association argues "*a violation accrues when a policy is implemented, not when it is merely announced,"* quoting from Arbitrator John Criswell's decision in a dispute involving the Cherry Creek, Colorado, School District (Cherry Creek School District v. Cherry Creek Education Association [May 30, 2017]). Since the implementation date did not occur until the Damon Smith emails of February 15 and 22, when the finalized program was announced, the grievance was filed within the 30 day window required by Article 44. The Association also contends this was new argument raised for the first time in the Opening Statement of the District during the hearing. As such, the Association had no opportunity to prepare a defense. They argue it should not be considered.

Waiver of Rights

Citing *Radio Technical School* (supra), the Association contends the District's waiver argument "*Should not be lightly inferred. It must be clearly and unmistakenly established before it can be relied on...*" They argue the Association did not waive any right as they asserted their rights by way of the grievance filing. The Association responded similarly to two previous compensation/failure to bargain disputes in the same manner, which were upheld in arbitration.

Position of the District

Merits of the Case

The District argues

> "*The one-time stipends paid pursuant to an experimental one-year pilot program are not wages or other conditions of employment described in Article 2 of the Master Agreement."* [4]

The District also looks to the Act for guidance in interpreting a party's duties under collective bargaining agreements and cites the same *Jefferson County School District* case the Association did to support that reliance. However, they then argue the Act would not have required the District to negotiate the program before its implementation. They also support their argument by way of a decision reached by the Florida Supreme Court in *United Teachers of Dade v. Dade County School Board,* 500 SO.2d 508, 513 (Fla. 1986).

They argue the stipends were not paid for services rendered or labor performed. Since they are not ongoing, do not impact the salary schedule, are not part of base pay, and not

[4] Post-Hearing Brief of the District

subject to retirement withholding under the Colorado Public Employees Retirement Association (PERA) they cannot be considered as a wage.

They distinguish the case at bar with decisions cited by the Association from Judge Larry J. Naves (*Aurora Public Schools v. Aurora Education Association, 2015 -320A, July 20, 2015)* and Arbitrator Michael J. Sullivan (*Denver Public Schools v. Denver Classroom Teachers Association, 01-15-0006-0218, July 19, 2016*) over somewhat similar disputes. Citing different circumstances in the Naves case and a poorly constructed decision by Arbitrator Sullivan, they argue these cases offer no support for the Association's position here.

They also contend the other stipends, bargained for and contained in the Agreement, are distinguishable in that they are ongoing programs which provide annual payments. The naming of a payment as a stipend does not establish it as a wage subject to negotiation. They characterize these payments as *"...temporary one-time payments made as part of an experiment to generate data to inform broader policy decisions regarding hard to fill positions."*

Timeliness

The District contends the Association knew, or should have known, of the program as early as January 9, 2018 when a request for funding was presented to the Board of Education at a public meeting, or by way of the January 23 Board meeting when funding was approved – a meeting which President of the Association, Bruce Wilcox, attended. Further notice was provided in the widely disseminated Damon Smith email of February 8, 2018. Yet, the grievance was not filed until March 15, outside the 30 day window for any of these events, which should be held against the Association.

Waiver of Rights

The District argues here that the failure of the Association to request to bargain the terms of the pilot program constitute a waiver of their right under the zipper clause of Article 48. In believing the matter should be a subject of negotiations, but then not raising the issue, the Association *"knowingly and voluntarily waived that right,"* (if they had it in the first place).

ANALYSIS AND OPINION

Timeliness

The Agreement requires the aggrieved party to file their grievance within 30 days of knowing, or the date they should have known, of the circumstances giving rise to the grievance, and renders invalid a grievance not timely filed. Timeliness is an affirmative defense.

Although the District doesn't point to a single event as the date circumstances arose which should have triggered a grievance, if one was to be filed, they name a number of events which should/could have created a basis for challenging the District's plan under the arguments raised here – a failure to bargain.

The Association has two responses 1) The District first raised the issue at the hearing, making a defense difficult, citing arbitral authority which rejects the practice of an 11th hour objection as being untimely in and of itself. 2) The grievance was timely filed as the Association is not obligated to respond to the intentions of the District, only their actions. The grievable action took place when they learned of the details of the program.

Although the Association protests the last-minute raising of the timeliness argument (and under many circumstances this would be convincing), this Agreement allows for a timeliness objection at any level of the grievance procedure.

> *If the question of arbitrability or timeliness is contested at any level of the grievance procedure, the questions and the grievance shall be submitted immediately to Step 3 of this procedure.* [5]
>
> Emphasis added

Since arbitration is the 3rd Step of the procedure, the door appears to be open for such contest at the hearing. Also, because we are already at Step 3, I have taken the District's raising of the issue to be the submission to Step 3 called for in the provision. I find nothing improper with the District's raising their timeliness defense at the hearing. The timeliness issue is properly before me.

As the party having the burden of proving the timeliness argument, the District offers multiple events that could have been a precipitating event for the grievance – the January 9 request for funds for the program, the January 23 approval of those funds, or the Damon Smith email of February 8. The Association pushes back, saying none of these events contained enough specificity to trigger a grievance and they weren't aware of some of them.

In December 2017, Superintendent Munn informed the Association that the District would be pursuing an incentive program. According to the only witnesses who testified about this meeting, Association UniServ Representative Sarah Fitouri and Association President Bruce Wilcox, the communication came during a standing monthly meeting between the Association and the District, but no details were shared. Both Ms. Fitouri and Mr. Wilcox testified they were "*informed*" of the District's intent to pursue a program. Mr. Wilcox stated the Association "*asked for a seat at the table*" to help in its development, but one was never

[5] Agreement Article 44, Section 5.b.

provided. Clearly, there was insufficient information shared at this point to generate a contractual challenge.

The discussions at the January Board of Education meetings were also incomplete. The minutes do not reveal adequate detail was discussed or provided over which the Association could have filed a grievance. In addition to a request for funding and approval of funding, the only detail provided was captured as follows:

> *Dr. Armstrong-Romero followed up and also asked about hard to fill positions with constraints to fill substitute teachers, her question was to clarify the $1.8 million a temporary fix. Munn stated it is not a sustainable amount it is to develop a pilot to see if there is success in addressing hard to fill positions. If there is success the district will return to the board to see if there are funds to move forward or not.* [6]

Details, such as how the funds were to be paid, at what schools, to whom, when, and how much, were not divulged, and maybe not yet even promulgated. Note Mr. Munn stated "*to develop a pilot*".

A grievance over the District's sharing of their intent, with no detail provided, would be guesswork at best. The Association waited to see what the District was going to do, including the possibility they would be invited to participate in the formulation of the program as they requested. Mr. Wilcox testified, "*we waited to hear (*from the District), *but did not.*"

If a bargaining representative were to be held to a standard of filing a grievance over such scant information, they would be filing grievances over every possible infraction to protect their interests. This would lead to chaos in the administration of the grievance process. The parties would be bogged down in disputes over policies not fully formed, not implemented, and/or outside the scope of the collective bargaining agreement. No, grievances must be based on facts not conjecture.

In the Criswell case cited by the Association (supra), Arbitrator John Criswell took this concept even further, dismissing a timeliness challenge by reasoning "*...the adoption of a policy does not give rise to a grievance. It is only when the policy is implemented, so that it actually adversely affects the employee that there is a basis for a grievance.*"
Arbitrator Criswell provides the following citation to support his conclusion,

> *For example, Elkouri and Elkouri, "How Arbitration Works" (ABA 7th Edition 2012), sec 5.7 A. IV., at pp 5-28 through 5-29, says,*

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[6] Minutes of the January 9, 2018 Board of Education Meeting page 4, Item 5.B.

> *A party sometimes announces its intentions to perform an act, but does not culminate the act until a later date. Similarly, a party may perform an act whose adverse effect on another does not result until a later date. In such situations arbitrators have held that the 'occurrence' for purposes of applying the timeliness limits is the later date.*

The Smith Memorandum of February 7 was the first time the District divulged any detail of the program. Yet, even then, an important element was not yet decided – the naming of eligible schools. It is also significant there is no evidence the memo was shared with the Association. They are not cc'd on the email and Mr. Smith couldn't recall if he provided them a copy. It was not established the Association knew or should have known of the circumstances giving rise to this grievance based on the February 7 Memo.

The Smith email of February 15 updated the February 7 email. In this Memorandum, schools eligible for the stipend were identified. The Association received a copy of this email, although no one could remember how. Then, on February 22, Mr. Smith sent another email providing an overview and logistical information to a long list of recipients, job titles of whom were not developed. One element of this email was an announcement of next steps, including "*a communication will be sent to all APS teachers to announce the Recruitment and Retention Pilot, eligible positions and schools,"* indicating teachers were not yet informed.

Article 44 requires a grievance be filed within 30 days of the date the grievant knew, or should have known, of the circumstances giving rise to it. The Association filed their grievance on March 15, which was within 30 days of the February 15 email. The February 15 email revealed the full details of the program and set it in motion. Although there was no showing the District shared this information with the Association, the Association acknowledged seeing it. This then was the first possible date they knew or should have known of the circumstances giving rise to the grievance. I find no merit to the District's timeliness challenge. The Grievance was timely filed and is properly before me.

Waiver

The District also argues the Association waived their right to bargain over the program by not requesting such bargaining, contending the "*entire agreement*" clause in Article 48 provides that a right to bargain over a subject is waived if such issue is not included in the Agreement. They point out the parties engaged in bargaining in the spring of 2018 and the Association did not attempt bargaining over the stipends.

The Association counters they asserted their rights by filing the grievance – the same method they employed when they challenged two previous unilateral efforts by the District to modify employee compensation.

A significant part of the District's defense here is the *entire agreement* provision. It is interesting they raised a similar defense in prior disputes, in which the arbitrators found the argument unconvincing.

In the Naves case (supra), between these same parties, Arbitrator Naves articulated the District's waiver defense as follows:

> *Article 47 of the CBA acknowledges that the CBA constitutes the parties' entire agreement and is a waiver of the right to bargain about any subject or matter not specifically referred to in the CBA. The CBA does not address salary increases as a retention initiative. ...under the plain language of Article 47, even if upward salary adjustments in the nature of the Paris Retention Initiative would properly be the subject of negotiation, the Association waived that right in Article 47.*

Arbitrator Naves went on to provide a brief history of the parties' wage negotiations and concluded the absence of a provision specifically addressing the initiative unilaterally implemented by the District did not amount to a waiver. He found:

> *The evidence presented indicates that the parties have historically bargained for other salary increases beyond those agreed to in the salary schedule.*
>
> ....
>
> *The course of dealing between the parties demonstrates that the Aurora Education Association has had broad authority to negotiate wage increases of the type at issue in this case, and there was no evidence presented that the Aurora Education Association knowingly agreed to waive this authority.*

The District also made a waiver argument, relying on past acquiescence by the Association and the Agreement's "Zipper Clause" in front of Arbitrator Carlton Snow (*Aurora Public Schools and Aurora Education Association, American Arbitration Association (AAA) Case #77 300 0066 89, July 23, 1990*). Arbitrator Snow analyzed both arguments in great detail, but rejected them and found no such waiver.

The waiver argument has loose ties to the merit arguments, specifically in how the stipend is classified. As Arbitrator Naves found, if the stipend is compensation, the Association could not have waived its right as it regularly and routinely bargains over the issue. The

District's unilateral implementation would be extra-contractual, as it was not something they bargained for.

Yet, even if the stipend is something entirely new, other than compensation, questions on waiver still exist, including who's obligation it is to raise the issue - the District's, as the implementer of the program, or the Association's, as the jilted partner. The District argues, *"Mr. Wilcox and Ms. Nichols testified that they did not raise the issue of bargaining stipends in the negotiation process even thought they were aware of the pilot program."*

Notwithstanding this argument, if a party wishes to bargain over an issue other than compensation, the Agreement requires that party to notify the other of their intent to raise an issue in negotiations by November 1 of the preceding year (in this case, 2017). The Association had no knowledge of the District's intent until February 15, 2018. They could not have anticipated the issue in time to make it one of the two items to be bargained during the 2018 negotiations. Under cross-examination, Ms. Fitouri cited these limitations as to why the Association did not formally propose bargaining.

I do not find the District's argument to be compelling. Even if the parties were willing to mutually agree, in writing, to bargain over the terms of the program, as appears to be allowed under Article 3.1, the District had already finalized the program by the time the Association became aware of it. The details had been determined, announced, and were being implemented. The Association said, by way of this grievance, you should not have instituted this program on your own…you had an obligation to negotiate its terms and you did not…you are in violation of the Agreement. A call to bargain might have been appropriate had the train not left the station, but it did. The chance, the opportunity, the obligation (if there was one) to bargain was before the February 15th email, not after the program was announced, in place, and being implemented. The Grievance addressed an alleged violation that had taken place, and asked for retrospective redress. It could have also resulted in prospective remedies. On the other hand, bargaining would normally only address future conditions and, as such, be purely prospective. The Association had the right to protect its interests and file the grievance over the violation they believe had occurred. The remedy requested in the grievance implied an openness to discuss details (to bargain, if you will) using the grievance procedure as the mechanism.

I find the Association did not waive their right to bargain the details of the disputed stipend.

On the Merits

The District argues they have no responsibility to bargain for a one-year pilot program over stipends that were not wages or any other condition of employment as described in Article 2. They draw support from the *United Teachers of Dade* (supra) and distinguish this case from two of the cases cited by the Association (the Naves and Sullivan decisions).

The Association began their presentation at the hearing by stating, *"This is déjà vu all over again,"* arguing the duty to bargain had been previously disputed and decided in the Association's favor. They contend the District had a clear obligation to bargain the terms of the program as the Association is the recognized exclusive bargaining agent and the stipend is compensation. They point to other bargained for stipends contained in the Agreement and the District's raising the very topic of *"hard to staff positions"* during bargaining in 2016, in which the parties could not agree to the terms of a program.

Despite the agreed upon fact the District is not under the jurisdiction of the NLRA, both parties rely on the Act for interpretive value. In addition, and in support of that reliance, Arbitrator Carlton Snow, in the first of any of the other cited decisions (supra – 1990), undertook an in-depth examination of the District's duty to bargain, in this relationship, under the terms of the Agreement, using the Act as guide, pointing out,

> *...the arbitrator's role in this case is to determine the contractual intent of the parties rather than to explicate their statutory duties as interpreted by the National Labor Relations Board or some comparable public sector entity.*

He goes on to reason,

> *Decisions of the National Labor Relations Board, however, may be a relevant source of guidance in determining the parties' intent. In other words, decisions by the National Labor Relations Board, relevant judicial teachings, and arbitration decisions all provide a body of principles which are the context for collective bargaining negotiations today... No collective bargaining relationship today is so much a world unto itself that it has developed in a vacuum without regard to employment relations principles at work in the larger society.*
> *Absent contractual authority to the contrary, the parties are presumed to have brought their contractual relationships into existence within the context of established arbitral principles.*
>
> . . . .
>
> *In the absence of contrary instructions, the parties are presumed to have expected a reader of their collective bargaining agreement*

> *to rely on established principles of contract interpretation and arbitral doctrine to construe any vague terms or to pour meaning into any contractual gap.*

All of that is to say, although there is no precedential value in these outside perspectives, there is persuasive value. I endorse Arbitrator Snow's reasoning and conclusions. Given this reasoning, it is no surprise each party also researched and cited decisions from other authorities besides the Act and federal courts. The District points to a decision of the Florida Supreme Court and the Association points to arbitration decisions from other Colorado school districts.

The Association cites three cases, two from this school district and one from Denver Public Schools on the issue of non-negotiated stipends or incentive payments to teachers.

After providing the foundation for looking to external law for help with interpretation or application of the Aurora Agreement (discussed above), Arbitrator Snow moved to examine whether the Agreement embodied a structure similar to the Act regarding the duty to bargain and concluded it did.

In that case, Arbitrator Snow was faced with arguments similar, but not identical, to those made by the District here, that a stipend for "*extra duties*" was not a wage in the context of the Agreement (and therefore not a subject to be bargained). Snow found the contrary, that compensation for *extra duties* was covered under the Agreement.

He found additional grounds for upholding in the grievance, as follows …

> *Even if the Employer were correct in arguing that the stipend for Staffing Chairpersons was not a matter contained in the parties' agreement, its actions still would have breached the parties' agreement. In Article 2 of the parties' agreement, the Employer agreed to bargain solely with the Association with respect to matters involving wages, hours, and other conditions of employment. Management, however, clearly bargained with individual Special Education Teachers when it offered a stipends (sic) to those willing to accept additional responsibilities as a Staffing Chairperson.*

Arbitrator Snow concluded his analysis by saying:

> *Read as an entire document, the parties' agreement has imposed on management an over-arching duty to notify the Association and to offer to negotiate about matters involving wages, hours, or conditions of employment before management makes a change in one of those areas.*

Arbitrator Naves was faced with the District unilaterally deciding to address staff retention by paying teachers at one particular school a salary increase equivalent to half of a step on the salary schedule and promising an extra half-step if they returned the following year. The District argued the Agreement only established a floor beneath which employees could not be paid, but that the District had the authority to pay more than the agreed upon minimums. Judge Naves ruled in the Association's favor, deciding the Agreement did not simply establish minimums and found the District violated the Agreement by not bargaining the salary increases with the Association.

The Sullivan decision from Denver Public Schools dealt with the Denver School District's implementation of an incentive pay program in certain high needs schools without negotiating the terms of the program. In finding the Denver District's action to be in violation of the Agreement, Arbitrator Sullivan wrote,

> *The unilateral action by the DPS was unprecedented within the agreement. Management Rights do include those tasks not jointly placed into the Master Agreement. The Master Agreement requires the Parties to negotiate salaries, wages, hours and conditions as specified within the terms and conditions of employment.*

In drawing on interpretations of the Act, the Association contends, "*The reason that unilaterally-imposed increases in compensation constitute an unfair labor practice is that such management conduct undermines a union's authority amongst the employees whose interests it represents,* and cites *NLRB v. C&C Plywood Corp., 385 U.S. 421, 429 (1967)* and *J.I. Case v. NLRB 321 U.S. 332, 338 (1944)* to support that contention.

The District's reliance on the United Teachers case is two-fold. They first cite a finding of significant difference in private v. public collective bargaining due to the *public management prerogative to determine policy.* They also point to the finding that a stipend paid to teachers for reaching a "*Master Teacher"* ranking was not a wage, in that if would not include payment for services rendered or labor performed.

In their analysis in the *United Teachers of Dade* decision, the Florida Court employs some of the logic already established here, borrowing from decisions from other public jurisdictions. They distinguish public bargaining from the private sector as detailed by the Pennsylvania Supreme Court,

> *[W]e are not suggesting that the experience gained in the private sector is of no value here, rather we are stressing that analogies have limited application and the experiences gained in the private*

> *employment sector will not necessarily provide an infallible basis for a monolithic model for public employment. Pennsylvania Labor Relations Board v. State College Area School District, 461 Pa. 494, 500, 337 A.2d 262, 264-265 (Pa. 1975).*

In addition, the Florida Supreme Court pointed to the Supreme Court of Connecticut's finding there was no *"unwavering line"* that separated the categories of policy decisions that impact or do not impact a teacher's conditions of employment (West Hartford Education Association, Inc. v. DeCourcy, 162 Conn. at 581, 295 A.2d at 534).

The Florida Court went on to cite the Iowa Supreme Court's examination of a similar issue:

> *In Fort Dodge Community School District v. Public Employment Relations Board, 319 N.W.2d 181(Iowa 1982), the Supreme Court of Iowa... reasoned that the incentive payment in question was not a wage, as that term in its commonly understood meaning "would not include payment for services not rendered or labor not performed." Id. at 184. Similarly, the payment was not supplemental pay as there were no additional services rendered by the recipient teachers. The court distinguished supplemental pay from wages, as the former contemplates additional services rendered over and above the wages payable under the teacher's basic contract, such as a teacher who performs extra duties as a coach. Id.*

They concluded then,

> *We find this reasoning persuasive for determining the issue before us. Under the Master Teacher Program, no additional teaching services are required to be performed by the teachers who voluntarily choose to compete for the payment authorized by section 231.533. As the petitioners point out, the existing contracts with the respective school boards already contain provisions, arrived at after collective bargaining, which compensate teachers for extra-curricular labors such as coaching. Likewise, their contracts contain duly negotiated provisions for determining entitlement to true merit increases. The payment in question here does not replace or interfere in any way with those bargained-for provisions. Nothing in the pleadings shows that the payments in question, nor the concomitant designation of a teacher as an associate master or master teacher, is to be used as criteria for future promotions or as a basis for additional compensation (other than the statutory payment) which would arguably be within the ambit of collective bargaining. Since we find the payment under section 231.533 not to be a wage, we find that the subject area test, section 231.534, and the administrative rule, as uniform procedures adopted solely to implement the Master Teacher*

Program, do not abridge the petitioners' rights guaranteed by article I, section 6.

The United Teachers of Dade case involved an act of the Florida legislature that provided economic incentives for teachers in the state to qualify as a *Master Teacher*. The United Teachers of Dade (an affiliate of the American Federation of Teachers) brought suit arguing the program infringed on the Federation's collective bargaining rights. I believe it is a significant difference that the underlying action in Dade was a legislative initiative. Although elements of the case dealing with wage definition might have value in this examination, the dispute in the United Teachers case was between the Federation and the Legislature between whom no collective bargaining agreement existed. The Florida legislature was not a party to the collective bargaining agreement between Dade teachers and the Miami Dade School District. The Florida Court decided the legislative action did not impinge on the teacher's collective bargaining rights – a different matter.

Similarly, the decision in the Iowa case hinged, in large part, on state law not relevant to this case. The departure from state law and potentially more applicable analysis classified the payment to teachers over the age of 60 as *payment for services not rendered or labor not performed,* which is akin to the Florida Court finding. Yet, I distinguish that reasoning from the case at bar. In the case before me, teachers had a choice – to teach at a targeted school and earn extra money (thus providing a valued service) or teach in a non-targeted school for less.

The Aurora District's incentive was conditional. It was for a service rendered and labor performed. If teaching at the targeted schools was not a needed service the District would not have incentivized it. The teachers were unambiguously rendering a service and performing valued labor.

The overwhelming conclusion of these opinions, from the early days of collective bargaining in the private sector to more recent disputes in this and neighboring school districts, is that employers must negotiate compensation issues with the employees' bargaining agent. Although there is no *unwavering line",* there is a line.

The District contends the issue before me is dissimilar to that decided by Judge Naves since the payments in that case were (or would have been) ongoing changes to the salary schedule. They also distinguish the current issue from the *Katz* decision, relied upon by Naves (*NLRB v. Katz 369 U.S. 736 [1962]*), as the fulcrum of *Katz* was a "*material or substantial"* modification of the conditions of employment. They argue the stipends are neither, characterizing them as "*...temporary one-time payments made as part of an experiment to generate data to inform broader policy decisions."*

Although the intentional ongoing nature of the payments in the Naves case is different, I disagree it has no value here. I also disagree that *Katz* has no application. In Katz, the Supreme Court held that where an employer unilaterally instituted a merit-increase plan, while negotiations were pending, such action should "*...be viewed as tantamount to an outright refusal to negotiate on that subject.*" *Katz* and its progeny provide great detail of the employer's obligation to avoid unilateral action and to bargain only with the recognized bargaining agent, along the lines of the conclusion drawn by Arbitrator Snow regarding the application of Article 2 in his analysis previously cited.

The District also contends since the Public Employees Retirement Association (PERA) decided the payments were not subject to state retirement withholdings, it must mean the stipends were not wages that needed to be bargained. The decision of PERA to classify the payments as a *signing bonus* adds little to this evaluation. Salaries and other income subject to PERA are statutorily classified for purposes of retirement credit and employer/employee contributions. The finding, under rules of a different authority, is not persuasive.

In the end, the conclusion of whether this stipend is a wage, although seemingly apparent, need not be decided. In applying the findings and logic of Arbitrators Snow, Sullivan and Naves, and the *"material or substantial modification"* standard of *Katz,* it is hard to conceive of a representation of the stipend other than as a *condition of employment*, which must be bargained with the exclusive representative of the bargaining unit. The payment of $2500 or $3000 stipends to teachers, many of whom make less than $50,000 per year, only under certain conditions, is a significant change to the collective pact, the Agreement. Eligibility criteria, the payment amounts, the conditions, the locations, all easily settle under the broad umbrella of *conditions of employment*. These elements were all unilaterally devised and implemented in contravention of the duty to bargain.

Additionally, the fact the District has bargained for other stipends and raised the hard to staff issue during the 2016 negotiations infers they understood the obligation to bargain the terms of such an incentive. An argument can be made they unilaterally attempted to impose a condition of employment they were unable to negotiate for.

Lastly, the Union cites *Lineback v. SMI/Division of DCX-Choi Enters, 2014 U.S. Lexis 158136 at * 29 (N.D. Ind. 2014)* as support for its argument that the *pilot program* aspect of the payment has no bearing on the outcome here. In *Lineback*, it was found a promise of future additional payments changed the nature of a bonus payment. Thus duration became a relevant factor. In the case at bar, Superintendent Munn's response to the Board's question was not that the pilot was a one-year program. It was that funding was only available for one year. The

details of the program were set. He was hopeful of the program's continuation if sufficient funding was available, thereby insinuating its continuation. The designation of the program as a "*pilot*" did not release the District from its obligation to bargain.

Remedy

The payments have already been made. It would be inappropriate to disturb them at this point and the Association did not request such a remedy. The Association's original request was 1) *The District cease the implementation of the Hard-to-fill pilot as currently designated. 2) The District bargain in good faith all issues subject to negotiation per the Master Contract including wages.* In their brief, the Association requested "*...the Arbitrator issue a decision holding that the unilateral imposition of the stipend at issue violated the Agreement."*

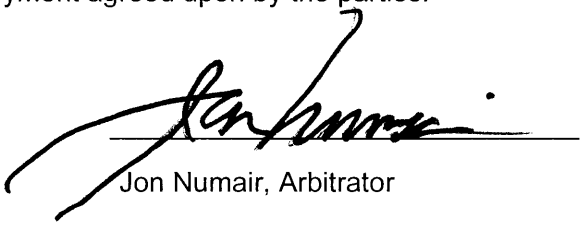
The modified request of the Association, contained in their brief, has the value and perspective of time, and is in concert with the second remedy originally requested. We cannot, at this point, halt the program. It was implemented. Its continuation is another matter. I have no idea if the District found the results of the program to be a success or if they have any plans to continue it. But, if they intend to continue this or some other iteration of it, they must bargain the terms with the Association.

CONCLUSION AND RECOMMENDATIONS

After consideration of all the evidence and testimony presented, along with the applicable provisions of the Agreement, for reasons detailed above, I find the District violated the Master Agreement by implementing a pilot program of "*incentives to recruit and retain staff in some of the hardest to fill positions"* without bargaining the program with the Association.

I make the following recommendations:

- I recommend the grievance be upheld.
- I recommend the District immediately cease and desist from further implementation of the recruitment and retention program.
- I recommend, in the future, the District must bargain over this or any program which changes conditions of employment agreed upon by the parties.



Jon Numair, Arbitrator

January 7, 2019